Case 4:98-cv-00819 Document 1 Filed on 03/20/98 in TXSD Page 1 of 15

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES COURTS
SOUTHLANDISTRICT OF TEXAS
FILED
MAR 2 0 1998 KD

Michael N. Milby, Clerk of Court

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**Plaintiff** 

VS.

HOME DEPOT INTERNATIONAL, INC., § HOME DEPOT U.S.A., INC. d/b/a § THE HOME DEPOT #577, OUTLET NO. 23 and ANTHONY DAIGLE §

**Defendant** 

1 98-0819

DEFENDANT DEMANDS A JURY

C.A. NO.

# NOTICE OF REMOVAL

## Defendant alleges:

- 1. Defendants, HOME DEPOT INTERNATIONAL, INC., HOME DEPOT U.S.A, INC. d/b/a THE HOME DEPOT #577, OUTLET NO. 23 ("HOME DEPOT") and ANTHONY DAIGLE, are in the civil action commenced on or about January 28, 1998, in the 334th Judicial District, Harris, Texas, in Cause Nº. 98-03451, entitled Frank Melton, Jr. v. Home Depot International, Inc., et.al..
- 2. Service of summons and complaint was made on Defendant, HOME DEPOT INTERNATIONAL, INC., by serving its registered agent, C.T. Corporation Systems, on February 19, 1998. The Original Petition is the initial pleading setting forth the claim upon which the action is based. Service of summons and complaint was made on Defendant, HOME DEPOT U.S.A., INC. by serving its registered agent, C.T. Corporation Systems, on February 19, 1998. Service of summons and complaint has not been made on Defendant, ANTHONY

DAIGLE. The following constitutes all of the process, pleadings, and orders served upon Plaintiff and Defendant in this action:

- (a) Plaintiff's Original Petition
- (b) Citation
- (c) Defendant's Original Answer
- (d) Request for Jury Trial
- (e) Plaintiff's Interrogatories to Defendant, Home Depot International, Inc.
- (f) Plaintiff's Request for Production to Defendant, Home Depot International, Inc.
- (g) Plaintiff's Interrogatories to Defendant, Home Depot U.S.A., Inc.
- (h) Plaintiff's Request for Production to Defendant, Home Depot U.S.A., Inc.
- (i) Civil Docket Sheet
- 3. The action is a civil action of which this Court has original jurisdiction under Title 28 U.S.C. §1332, and is one which Defendant is entitled to remove to this Court pursuant to title 28 U.S.C. §1441, in that the matter in controversy is believed to exceed the sum of SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$75,000.00), exclusive of interest and costs, the action is between citizens of different states, and at the time of the commencement of this action and at all times since the Defendant, HOME DEPOT, has been and is still a corporation incorporated under the laws of the State of Delaware, having its principal place of business in Georgia, and Plaintiff has been and is still a Texas citizen.
- 4. The joinder of defendant ANTHONY DAIGLE is fraudulent because he is not named in his individual capacity, he is a nominal party, he does not owe a separate and independent duty to the plaintiff, and he was acting in the course and scope of his employment and any alleged negligent acts are deemd as acts of the corporation.
- 5. Defendant hereby demands a Jury.

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Considering the foregoing, Defendants pray that the above action now pending in the 334<sup>TH</sup> Judicial District Court of Harris County, Texas, Cause Nº. 98-03451, entitled *Frank Melton, Jr. vs. Home Depot International, Inc.*, be removed from that Court to this Court.

Respectfully submitted,

Alan N. Magenheim

SBOT: 12816200

Attorney-in-Charge for Defendants

OF COUNSEL:

ClibPDF - www.fastio.com

MAGENHEIM, BATEMAN, ROBINSON, WROTENBERY & HELFAND, P.L.L.C. 3600 One Houston Center 1221 McKinney Houston, Texas 77010 (713) 609-7849 (713) 609-7777 (Fax)

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *NOTICE OF REMOVAL* has been forwarded to all counsel of record by certified mail, return receipt requested, on March , 1998.

Alan N. Magenheim

NO.	98-03451	
		St. St.
FRANK MELTON, JR.	S IN THE	DISTRICT COURT OF
VS.	\$ \$ \$	All of the or
HOME DEPOT INTERNATIONAL,	S HARRIS	COUNTY, TEXAS
INC., HOME DEPOT U.S.A., INC. D/B/A THE HOME DEPOT #577,	§ §	
OUTLET NO. 23 and ANTHONY DAIGLE	S S	JUDICIAL DISTIRCT

#### PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW FRANK MELTON, JR., hereinafter referred to as Plaintiff, complaining of HOME DEPOT INTERNATIONAL, INC., HOME DEPOT U.S.A., INC. D/B/A THE HOME DEPOT #577, Outlet No. 23 and ANTHONY DAIGLE, hereinafter referred to as Defendants, for cause of action and would respectfully show this Honorable Court and jury the following:

I.

Plaintiff FRANK MELTON, JR. is a resident of Harris County, Texas.

Defendant, HOME DEPOT INTERNATIONAL, INC. is a Delaware corporation doing business in the State of Texas. This Defendant may be served with due process herein by serving its registered agent for service, CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

Defendant, HOME DEPOT U.S.A., INC. is a Delaware corporation doing business in the State of Texas. This Defendant may be served

with due process herein by serving its registered agent for service, CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

Defendant, HOME DEPOT U.S.A., INC. D/B/A THE HOME DEPOT #577, OUTLET NO. 23, is a Delaware corporation doing business in the State of Texas. This Defendant may be served with due process herein by serving its registered agent for service, CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

Defendant, ANTHONY DAIGLE, is an individual residing in Harris County, Texas. This Defendant may be served with due process herein at his place of busines at The Home Depot #577, Outlet #23, 999 W. North Loop, Houston, Texas 77008.

II.

Venue is proper in Harris County, Texas in that the occurrence made the basis of this suit occurred within Harris County, Texas.

III.

On or about March 1, 1996, Plaintiff suffered injury to his right foot within the premises known as Home Depot #577, Outlet No. 23 in Houston, Harris County, Texas, when a spool of wire which was being changed by Home Depot employee, Anthony Daigle, slipped of the rack, falling on Plaintiff's right foot.

Defendants, HOME DEPOT INTERNATIONAL, INC., HOME DEPOT U.S.A., INC. are the owners and/or occupiers of the premises in question.

Plaintiff brings this suit to recover for personal injuries sustained by as a result of the injury referenced above which was proximately caused by the negligence of the Defendants and the dangerous and unsafe condition of the premises in question.

As a result of the injury above described, the Plaintiff suffered severe personal injuries to her right foot and other parts of his body causing Plaintiff to sustain permanent bodily impairment. Plaintiff has suffered a loss of wages and fringe benefits in the past and will suffer a loss of wage earning capacity in the future. Plaintiff has also experienced physical pain, suffering, mental anguish and loss of life's pleasures and will, in reasonable probability, continue to do so in the future by the reason of the nature and severity of Plaintiff's injuries. Plaintiff has been caused to incur medical charges and expenses in the past and will continue to incur medical expenses in the future for Plaintiff's injuries.

V.

By reason of the above and foregoing, Plaintiff has been damaged in a sum far in excess of the jurisdictional limits of this court.

VI.

The Plaintiff further states that the occurrence in question was caused by conduct so grievous by the Defendants, including gross negligence by the Defendants, that it demonstrated a willful and wanton disregard for the safety and health of the Plaintiff. Thus, Plaintiff is entitled to exemplary and punitive damages which he alleges in this case to be in excess of the minimal jurisdictional limits of this Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that citation issue and be served upon the said Defendants in the form and manner

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prescribed by law, requiring that the Defendants appear and answer herein; and that upon final hearing hereon, the Plaintiff have judgment against Defendants, both jointly and severally, in a sum far in excess of the jurisdictional limits of this Honorable Court; liable therefor that the Plaintiff recover full damages for his losses, together with interest thereon, both prejudgment and post-judgment from the date of trial; and that exemplary damages in the sum in excess of the minimal jurisdictional limits of this Court be paid; all costs of Court; and such other and further and general relief to which the Plaintiff may be justly entitled to, in law and/or in equity.

Respectfully submitted,
SCHECHTER & MARSHALL, L.L.P.

MATTHEW D. SHAFFER

TBA #18085600

3200 Travis (at Elgin)

Houston, Texas 77006

(713) 757-7811

FAX NO. (713) 751-0412 ATTORNEY FOR PLAINTIFF

PLAINTIFF DEMANDS A TRIAL BY JURY

CAUSE NO. 9803451

Judical District Court of Harris County, Texas 301 Fannin, 6th Floor Houston, TX  **Additional parties are named in the attached detition.  **THE STATE OF TEXAS TOURTY Of Harris  **THE STATE COUNTY, TEXAS TOURTY OF TEXAS TOURTY OF HARRIS  **THE STATE COUNTY, TEXAS TOURTY OF HARRIS TOURTY OF HARRIS  **THE STATE COUNTY, TEXAS TOURTY OF HARRIS  **THE STATE COUNTY, TEXAS TOURTY OF HARRIS TOURTY OF HARRIS  **THE STATE COUNTY, TEXAS TOURTY OF HARRIS TOURTY TOURTY OF HARRIS TOURTY TOURTY TOURTY TOURTY TOURTY TOURTY TOURTY TO	RECEIPT	No. 418919	LOI v.	MTA
of Marris County, Texas Sal Tannin, 6th Floor Houston, TX  THE STATE OF TEXAS SOUNTY Of Harris  OI DAISLE. ANTHONY 998 W NORTH LOOP HOUSTON TX 77888  Attached is a copy of OFIGENAL PETITION The instrument was filed on the 2th day of January, 1998, in the above cited cause number and court. The instrument attached describes the claim against you.  TOO MARKE MEEN SWED. You may employ an attorney. If you or your attorney do not file a ritten answer with the District Clark who issued this citation by 1988 a.m. on the Monday act following the expiration of 26 days after you were served this citation and petition default judgment may be taken against you.  TOO OFFICER SERVING:  This citation was placed on 85th day of February, 1998, under my hand and seal of easy Court  Saued at request of the service of the se	PLAINTIFF: MELTON, FRANK JR	01-28-1998		
Additional parties are named in the attached bettion.  384 Fannin, 6th Floor Mouston, TX  CITATION 1 1038  Ounty Of Harris  Ounty Of Harris  Out Parties  Out Parties  Out Parties  Out Parties  Out Parties  Out Parties  Attached is a copy of ORIGINAL PETITION  This instrument was filed on the 28th day of January, 1998. In the above cited cause number of court. The instrument attached describes the claim against you.  YOU HAMME BEEN SUED. You may employ an attorney. If you or your attorney do not file a ritten answer with the District Clark who issued this citation by 18:88 a.m. on the Monday executed Judgment may be taken against you.  TO OFFICER SERVING:  This citation was Passed on 85th day of February, 1998, under my hand and read of said Court.  Saued at request of Harris County, Texas 77882  (PO. Box 4651 Houston, Texas 77882  (PO. Box 4651 H	4.			
THE STATE OF TEXAS COUNTY OF Harris  O': DAIGLE, ANTHONY 999 W NORTH LODE HOUSTON TX 77888  Attached is a copy of DRISINAL PETITION This instrument was filed on the 28th day of January, 1998. In the above cited cause number and court. The instrument attached describes the claim against you.  YOU HAVE NEED SUED. You may employ an attorney. If you or your attorney do not file a west following the expiration of 28 days after you were served this citation and petition default judgment may be taken against you.  This citation was Therefore the days of February, 1999, under my hand and seal of said Court.  ANALYS AT ELETH  WHATES BACARISSE, District Clark Harris County, Texas 381 Fannin Houston, Texas 77882 (P.O. Box 4651, Mouston, Texas 77882 (P.O. Box 4651, Mouston, Texas 77882 (P.O. Box 4651, Mouston, Texas 17282)  BEAUTION OFFICER/AUTHORIZED PERSON RETURN Common to hand at o'clock M., on the day of  9 , by delivering to  OFFICER/AUTHORIZED PERSON RETURN Composite the day of  9 , by delivering to  OFFICER/AUTHORIZED PERSON RETURN Composite the day of  Affiant  The county, Texas  By County, Texas  OFFICER/AUTHORIZED PERSON RETURN Composite the day of  Affiant  The county of the Citation together with the accompanying copy(les) of the Citation the date of delivery, Ocently which I affix my hand officially this  Affiant  The county of the Citation the search manner recited on the curry.  Affiant  The county of the citation was executed by him/her in the exact manner recited on the curry.  LORN TO AND SUBSCRIBED DEFORE ME, on this day of  19  LORN TO AND SUBSCRIBED DEFORE ME, on this day of  Age of the curry of the curry of the curry.  Affine the curry of the curry.  LORN TO AND SUBSCRIBED DEFORE ME, on this day of  19  LORN TO AND SUBSCRIBED DEFORE ME, on this day of	DEFENDANT: HUME DEPUT INTERNATIONAL INC " -			
TOU DAISLE, ANTHONY See an North Loop Houston TX 77008  Attached is a copy of Original Petition This instrument was filed on the 28th day of January, 1998 , in the above cited cause number and court. The instrument attached describes the claim against you.  TOU BANKE REFER SORTO. You may employ an attorney. If you or your attorney do not file a ritten answer with the District Clerk who issued this citation by 10:00 a.m. on the Monday executed this citation and petition default judgment may be taken against you.  To OFFICER SERVING:  This citation was "Issued on 85th day of February, 1998, under my hand and cefault judgment may be taken against you.  To OFFICER SERVING:  This citation was "Issued on 85th day of February, 1998, under my hand and real of eabld Court.  Seesued at request of the America County, Texas 381 Fammin Mayeron, Texas 77002  WOUNTYOURS WAS ARTHOUR DESCRIPTION OF TEXAS 77002  BY JUDGMEN TO AND SUBSCORISE BEFORE ME, on this accompanying capy of the Citation the date of delivery.  O county, Texas 4851, Houston, Texas 77002  By delivering to consider with the accompanying capy(iss) of the Citation the date of delivery.  O cartify which I affix my hand officially this day of the Citation the date of delivery.  Affiant Security which I affix my hand officially this hand to me to be the person whose ignature appears on the foregoing return, personally appeared. After being by me duly sworreshed that this citation was executed by him/her in the exact manner recited on the sturm.	* Additional parties are named in the attache	d petition.		
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CAUSE NO. 9803461

REG	EIPT No. 418819 01-28-1998	IOJ MTA TR # 071211519
PLAINTIFF: MELTON, FRANK JR		In The 334th
DEFENDANT: HOME DEPOT INTERNATIONAL INC *		Judicial District Court
DELEMBRATI MOME DEPOT INTERNATIONAL INC	- ·	of Harris County, Texas 301 Fannin, 6th floor
* Additional parties are named in the att	ached petition.	Houston, TX
THE STATE OF TEXAS County Of Harris		THIS COPY OF PROCESS WAS THE BAGBY OF THE O'CLE STORY OF THE
	$B_{V}$	
TO: HOME DEPOT INTERNATIONAL INC (DELAWARE REGISTERED AGENT CT CORPORATION SYSTEM 350 N ST PAUL STREET DALLAS TX 75201		IB ITS DEDUCE
Attached is a copy of ORIGINAL PETITIO	N .	
This instrument was filed on the <u>28th day</u> and court. The instrument attached(descri		
written answer with the District Clerk who next following the expiration of 20 days a default judgment may be taken against yo	o issued this citation after you were served	by 10:00 a.m. on the Monday
TO OFFICER SERVING:		
This citation was, issued on 05th day seal of said Court.	of February, 1998, und	ler my hand and
Issued at request of: SHAFFER, MATTHEW D 3200 TRÁVIS AT ELGIN HOUSTON TX 77006 Bar No.: 18085600	Harris County, 7 301 Fannin (P.O. Box 4651,	E, District Clerk  Texas Houston, Texas 77002 Houston, Texas 77210)  The Chille Chille 101/FGT/5210227
OFFICER/AUTH	ORIZED PERSON RETURN	
Received on the day of		o'clockM., and
executed the same in County, Te	xas, on the day of	, 19 . at
o'clock by Summoning the		*
by delivering to		
a corporation (  by leaving in the principa		
of	the said	
a true copy of this notice, together with	accompanying copy of	,
Serving cop \$	<u>.</u> .	
Affiant	By	Deputy
On this day, signature appears on the foregoing return, he/she stated that this citation was ereturn.	personally appeared.	
SWORN TO AND SUBSCRIBED BEFORE ME, on this	day of	. 19
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~.*	Notary Pu	blic

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#### NO. 98-03451

FRANK MELTON, JR.,	§	IN THE DISTRICT COURT OF
Plaintiff	· §	
Liamini	§	
vs.	§ c	HARRIS COUNTY, TEXAS
HOME DEPOT INTERNATIONAL, INC	8 78	
HOME DEPOT U.S.A., INC. d/b/a	§	
THE HOME DEPOT #577, OUTLET	§	
NO. 23 and ANTHONY DAIGLE	§	S >
	§	المستقدة المستونة الم المستقدمة المستونة ا
Defendant	§	334TH JUDICIAL DISTRICT

# DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HOME DEPOT INTERNATIONAL, INC., HOME DEPOT U.S.A., INC. d/b/a THE HOME DEPOT #577, OUTLET NO. 23 and ANTHONY DAIGLE, Defendants in the above entitled and numbered cause, and files this its Original Answer to the Petition filed against it and would respectfully show the Court and Jury as follows:

I.

Subject to such stipulations as may hereafter be made, Defendants assert a general denial as is authorized by Rule 92 of the Texas Rules of Civil Procedure, and Defendants respectfully request that Plaintiff be required to prove his charges and allegations against Defendants by a preponderance of the evidence as is required by the Constitution and laws of the State of Texas.

Π.

## AFFIRMATIVE DEFENSES

For further answer, if such be necessary, Defendants allege that the acts of Plaintiff, in failing to use ordinary care for his safety, was fifty-one (51%) percent of the cause of the alleged injuries, if any, or, in the alternative, that it was the sole cause.

Pleading further and subject to the foregoing without waiving same, Defendants allege that the accident made the basis of this suit was caused by the negligence of a third party or third parties over whom said Defendants had no control and said negligence was a proximate cause, or in the alternative, was the sole proximate cause of the Plaintiff's damages.

IV.

For further answer herein and without waiving same, Defendants would show that the Plaintiff, at the time and on the occasion in question, failed to use ordinary care for his own safety. Such negligence was a proximate cause, or, in the alternative, the sole proximate cause of the Plaintiff's damages.

V.

Pleading further and without waiver of the foregoing, Defendants would respectfully allege that under Texas law, a jury has wholly standless discretion to award exemplary damages in a tort case in which the Defendant acts with a sufficient mental state. Any award of exemplary damages violates the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution, in addition to Article 1, Section 19 of the Texas Constitution, in that:

- 1. Such punitive damages are intended to punish and deter defendant and thus this proceeding becomes essentially criminal in nature;
- The defendant is being compelled to be a witness against itself in a proceeding that is essentially and effectively criminal in nature, in violation of the defendant's right to due process, and in violation of the Constitutions of the United States and of the State of Texas;

- Plaintiffs' burden of proof to establish punitive damages in this proceeding, which is effectively criminal in nature, is less than the burden of proof required in all other criminal proceedings, and thus violates defendant's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and the rights of defendant under Article 1, Section 19 of the Texas Constitution; and
- 4. Inasmuch as this proceeding is essentially and effectively criminal in nature, defendant is being denied the requirements of adequate notice of the elements of the offense, and that such statutory and common law theories purportedly authorizing punitive damages are sufficiently vague and ambiguous, and Plaintiff's Original Petition purporting to invoke such statutory and/or common law theory is so vague and ambiguous as to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and in violation of Article 1, Section 19 of the Texas Constitution.

VI.

Pleading further, and without waiver of the foregoing, Defendants would respectfully allege that Plaintiff's claim for punitive or exemplary damages violates this Defendant's right to protection from being subjected to excessive fines, as provided in Article 1, Section 13 of the Texas Constitution.

VII.

Subject to the above pleadings and pleading alternatively, Defendants would respectfully show the Court that Plaintiffs are not entitled to any award of exemplary damages. Plaintiffs have not alleged sufficient grounds that would constitute gross negligence or malice.

VIII.

Pleading further, and without waiver of the foregoing, Defendants respectfully allege that if exemplary damages are awarded, any award should be subject to the limits imposed by §41.007 and §41.008 of the Texas Civil Practice & Remedies Code.

IX.

Pleading further and subject to the foregoing without waiving same, Defendants affirmatively allege that the damages and injuries, if any, alleged by Plaintiff results from pre-existing or subsequent conditions or events.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that it be released, discharged and acquitted of the charges filed against it, that Plaintiff take nothing by reason of this suit, and for such other and further relief to which Defendant may be justly entitled.

Respectfully submitted,

MAGENHEIM, BATEMAN, ROBINSON, WROTENBERY & HELEAND, P.L.L.C.

y: All Manager

Alan N. Magenheim

SBOT NO: 12816200 ( ) 3600 One Houston Center

1221 McKinney

Houston, Texas 77010

(713) 609-7849

(713) 609-7777 (fax)

ATTORNEYS FOR DEFENDANTS

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record, by certified mail, return receipt requested and/or facsimile, on this 13 day of 1998.

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Alan N. Magenheim

	NO. 98-03451	1
FRANK MELTON, JR.,	§	IN THE DISTRICT COURT OF >
	§	
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
HOME DEPOT INTERNATIONAL,	INC., §	
HOME DEPOT U.S.A., INC. d/b/a	§	
THE HOME DEPOT #577, OUTLET	' §	
NO. 23 and ANTHONY DAIGLE	§	
	§	
Defendant	§	334TH JUDICIAL DISTRICT

#### REQUEST FOR JURY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HOME DEPOT INTERNATIONAL, INC., HOME DEPOT U.S.A., INC. d/b/a THE HOME DEPOT #577J, OUTLET NO. 23 and ANTHONY DAIGLE Defendants in the above entitled and numbered cause and requests that a jury trial be held on said cause. A jury fee in the sum of \$30.00 has been paid to the Harris County District Clerk's office.

Respectfully submitted,

MAGENHEIM, BATEMAN, ROBINSON, WROTENBERY & HELFAND, P.L.L.C.

Alan N. Magenheim

SBOT: 12816200

3600 One Houston Center

1221 McKinney

Houston, Texas 77010

(713) 609-7849

(713) 609-7777 FAX

# CERTIFICATE OF SERVICE

I do hereby certify that a true and co	errect copy of the above and foregoing document has
been forwarded to all counsel of record	by facsimile and/or certified mail, return receipt
requested, on this 19 day of 1000	, 1998.
	Coan Mind
	Alan N. Magenheim

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